IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. [redacted]

RAYMOND E. FISHER,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In reply to the brief of the defendant-respondent, the plaintiff-petitioner respectfully submits:

I.

The Defendant's Answer Comprises an Attack on the Credibility, Not the Sufficiency, of Plaintiff's Evidence.

We respectfully submit that the defendant's answer to our Petition for Certiorari clearly indicates that the Court of Appeals improperly weighed the evidence and reviewed the jury's verdict and in so doing erroneously (1) drew all inferences unfavorably to the plaintiff, (2) resolved all conflicts in the evidence in favor of the defendant and against the plaintiff, (3) viewed all of the evidence *most unfavorably to the plaintiff*, and (4) viewed all of said

evidence most favorably to the defendant, all contrary to the decisions of this Court dealing with the function of a court of appeal on review of a jury verdict.

In order to support the decision of the Court of Appeals in setting aside the second jury verdict for the plaintiff and the trial court's judgment thereon, the defendant in its Statement of the Case (Brief in Opposition to Petition, pp. 3-6, both inclusive) argues the facts as determined by the Court of Appeals.

The very fact that the defendant precedes its brief with a photograph (Defendant's Exhibit No. 4)—which it admits (p. 25) is even less favorable to its position than the exhibit (Plaintiff's Exhibit 1) attached to our Petition for Certiorari—and many of defendant's other arguments prove that the question of the plaintiff's exercise of due care was a proper question of fact for the jury.

The defendant's brief is filled with arguments attacking the credibility, not the sufficiency, of plaintiff's evidence. In fact, its entire Statement of the Case (pp. 3-6) is simply a jury argument attempting to refute the plaintiff's evidence (p. 4), claiming that it is "greatly exaggerated" (p. 5), that it was a "late afterthought" (p. 5), and that it contained "material contradictions that weaken petitioner's [plaintiff's] entire case" (p. 5).

The defendant also contends (p. 4) that the plaintiff was negligent in that he "assumed" that there was a single track, and later in its brief (p. 25) makes the argument that the plaintiff "as an experienced traveler, must have known that most railroads in the country are double-tracked." That was a question for the jury. It is not a matter of judicial notice. The jury could properly determine and did determine that the plaintiff had the right to conclude from all of the facts in the instant case, as they appeared to him—including the lack of any blinker lights

or customary warning signs stating that there was more than one track—that there was only one track.

The defendant's argument (p. 25) that the railroad crossing was in level country disregards entirely the testimony to the contrary summarized in our Petition (pp. 15-16).

Defendant erroneously states (p. 26) that a warning sign (of more than one track) would have been useless because that warning would have been too close to the tracks to be adequate warning to the plaintiff. Whether this would have been true was a jury question. We have never contended that the warning of the existence of more than one track should have been contained on the cross-buck sign, too late and too small to be effective. Our point is that the omission of an *effective* warning that there was more than one track was one of the factors which the jury properly considered in determining that the plaintiff was not guilty of contributory negligence.

All of these arguments of the defendant were properly addressed to the jury, which rejected them. The fact that the defendant finds it necessary to rely upon this type of argument in this Court proves the point made in our Petition—that the Court of Appeals reweighed the evidence and substituted its own judgment for that of the jury on the question whether under all the circumstances of this case the plaintiff was guilty of contributory negligence.

The defendant plainly indicates by its own Statement of the Case and its arguments in this Court that the Court of Appeals (1) disregarded the plaintiff's testimony for the reason that allegedly the plaintiff had been impeached; (2) resolved all conflicts in the evidence in favor of the defendant and against the plaintiff; (3) drew all inferences from the evidence most unfavorably to the plaintiff, and (4) viewed all of the evidence most unfavorably to the plaintiff.

Having thus reweighed the evidence and drawn therefrom factual conclusions contrary to those drawn by the jury, the Court of Appeals then applied inapplicable Ohio decisions as pointed out in our Petition.

As to the law of Ohio, the defendant states (p. 15) that we failed "to cite one Ohio decision with facts similar to those presented here." On the contrary, we carefully pointed out (Petition, pp. 22-24) that the general rule in Ohio is that contributory negligence is ordinarily a jury question, and (pp. 24-28) that the cases relied upon by the Court of Appeals were all cases in which the plaintiffs were familiar with the railroad crossings involved—a factor not present here. The defendant now disputes this distinguishing feature of the Ohio cases, but it does not successfully rebut *Zirkoff* v. *Pennsylvania R. Co.*, 90 N. E. 2d 148 (1948) which makes the same distinction.

The defendant cites no authority for its contention that lack of familiarity with the railroad crossing plus failure to warn travelers that what looks like a single track crossing is actually a high-speed double track plus failure to guard the crossing with warnings ordinarily found at such high speed crossings permits the Court to decide the jury question—contributory negligence—as a matter of law.

It is the defendant which fails to cite cases like the present one. The cases cited by the Court of Appeals and by the defendant are clearly distinguishable from the instant case and do not change the normal rule that contributory negligence is a jury question in the courts of Ohio.

This Court has held repeatedly that the Courts of Appeal are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because appeals judges feel that other results are more reasonable. If this were not true, why have a jury?

II.

The Seventh Amendment Was Violated by the Court of Appeals When It Set Aside the Jury Verdict.

In its Brief in Opposition to the Petition, the defendant admits (p. 21) by way of lip-service that the evidence must be viewed in the light most favorable to the plaintiff. It further admits, as hereinabove outlined, that the Court of Appeals viewed the evidence in a light most unfavorable to the plaintiff. The defendant thereby admits that the Court of Appeals acted in place of, and in lieu of, the jury; in violation of the Seventh Amendment to the Constitution of the United States. Your Honors held in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654 (1935), as follows (p. 657):

> "The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court, *and issues of fact are to be determined by the jury* under appropriate instructions by the court." (Italics supplied.)

III.

The Plaintiff Has Shown Special and Important Reason for Granting a Review on a Writ of Certiorari.

In order to support its position that no "special and important" reasons were shown for granting review, the defendant has cited *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 206 (1938) to the general effect that "conflict among circuits is not of itself a reason," where it is merely corollary to a permissible difference of opinion in the state

courts. This Court, in the same opinion, also stated the following (p. 206):

> "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decision'."

As pointed out in our Petition, the conflict among circuits in our case is not "merely corollary to a permissible difference of opinion in the state courts," but is an important question of local law decided by the Court of Appeals in conflict with the law of Ohio as decided by the Ohio courts and by the Circuit Court of Appeals for the 6th Circuit.

Again, it is significant that the defendant believes it to be the job of the Court of Appeals to examine the record and "bring a thorough experience in dealing with evidence and determining its sufficiency to go to the jury" (See Brief in Opposition, p. 28). The Court of Appeals does not properly have the task of re-weighing the evidence to determine its sufficiency, but merely to view it in the light most favorable to the plaintiff to determine if any evidence is in the record to support the plaintiff's case. The Court of Appeals in our case viewed the evidence in the light most unfavorable to the plaintiff and determined the question of the credibility of the plaintiff and of the plaintiff's witnesses unfavorably to the plaintiff. The defendant's claim that the court examined the evidence in the light most favorable to the plaintiff is in complete contradiction with its own statement of the case and with the opinion of the court. It is significant that the defendant felt compelled to shore up the opinion of the Court of Appeals by indicating wherein the Court of Appeals was correct in disregarding the plaintiff's testimony, resolving conflicts in evidence in favor of the defendant, and in viewing the evidence most unfavorably to the plaintiff, and most favorably to the defendant.

Further, it certainly is of utmost importance to the injured person that his rights to a jury determination of the facts as guaranteed by the Constitution be protected from an improper reviewing and re-weighing of the case by a Court of Appeals which neither views the witnesses as they testify nor is authorized to determine the facts. In view of the great number of cases involving injured persons, if this Court took the position that it would not review judge-made facts in jury cases, then the final court of all such cases would be the Court of Appeals which would then have the right to take away the right of trial by jury.

In our case, two juries found favorably for the plaintiff on the facts. Two judges found favorably for the plaintiff on a motion for directed verdict. One of the judges in the latter of the two cases, a careful trial judge, found in favor of the plaintiff on defendant's motion for a new trial. In view of these facts, it was error for three judges who neither saw nor heard the witnesses to re-weigh the evidence and draw their own inferences of fact unfavorable to the Plaintiff and thereby reverse the jury verdict.

Wherefore, the Petition for a Writ of Certiorari and review should be granted.

Respectfully submitted,

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